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COMMITTEE ON
EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

May 4, 2023

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Acting Secretary Su:

The Committee on Education and the Workforce (Committee) is conducting oversight on the Department of Labor's (DOL) worker classification enforcement under the *Fair Labor Standards Act* (FLSA). On April 19, the Subcommittee on Workforce Protections held a hearing on "Examining Biden's War on Independent Contractors." During the hearing, we heard testimony indicating that while the Trump administration's independent contractor rule is still in effect, DOL's Wage and Hour Division (WHD) is ignoring it and determining a worker's classification using a different test than what is required by law. As part of this oversight, the Committee requests documents and information relating to how WHD determines whether a worker is an employee or an independent contractor.

Approximately 18.9 million individuals work as independent contractors.¹ Supporters of the independent contractor model point out the benefits of this framework: an independent contractor has the freedom to choose his or her own work schedule, while the employer maintains the flexibility to adjust work demands with current business needs, and the consumer benefits from a reduction in the cost of goods and services.

In January 2021, the Trump DOL issued a final rule entitled "Independent Contractor Status Under the FLSA."² This rule clarified and simplified the economic realities worker classification test under the FLSA by emphasizing two "core factors": a worker's control over his or her work and his or her opportunity for profit or loss. If these factors are not clear, the rule includes three "guidepost" factors consisting of (1) the amount of specialized skill required for the work that the potential employer does not provide; (2) the degree of permanence of the working

¹ Independent Contractor Status Under the FLSA, 86 Fed. Reg. 1168, 1210 (Jan. 7, 2021).

² 86 Fed. Reg. 1168 (Jan. 7, 2021) (codified at 29 C.F.R. §§ 780, 788, & 795).

relationship, focusing on the continuity and duration of the relationship and weighing towards independent contractor status if the relationship is definite in duration or sporadic; and (3) whether the work performed is “part of an integrated unit of production.”³ In contrast, the Biden administration’s independent contractor proposed rule would implement a complex six-factor test where the weight of each factor depends on the facts of the case and where additional factors may be relevant.

In May 2021, the Biden DOL issued a final rule to withdraw the Trump administration’s rule.⁴ In March 2022, a federal district court overturned DOL’s May 2021 final rule, ruling that the Biden DOL violated the *Administrative Procedure Act* by delaying implementation of the Trump administration rule without providing the public with a meaningful opportunity for comment.⁵ Contrary to the preferences of the Biden administration officials, the Trump DOL independent contractor rule is in effect.

In her hearing testimony, Ms. Tammy McCutchen—a former WHD administrator—brought serious allegations to our attention about WHD’s failure to determine worker classification in accordance with the Trump rule. She stated the following:

[T]he 2021 regulations have been and continue to be binding on the DOL when investigating and enforcing the FLSA. Whether the DOL has been applying those regulations, however, seems unlikely. The DOL’s misclassification website includes a notice of the court’s decision. But the 2021 regulations are nowhere to be found. Instead, the page has a link to Fact Sheet 13 and its list of seven factors—which is not the current law and has not been for over two years. The DOL’s website is providing erroneous information and misleading the public.⁶

Further, while summarizing recent conversations she had with an investigator from WHD and an attorney from DOL’s Office of the Solicitor, she stated the following:

Although they acknowledged the new regulations, the discussion focused entirely on the many and varied factors that the DOL considered before those regulations were adopted.... Nothing seems to have changed even though the new regulations have been in effect for over two years.⁷

This is not the first time the Biden DOL has demonstrated its open hostility to workers who choose to be independent contractors.⁸ Within less than a week of taking office, the Biden administration withdrew two WHD opinion letters the Trump administration published to

³ *Id.*

⁴ [Independent Contractor Status Under the Fair Labor Standards Act \(FLSA\): Withdrawal, 86 Fed. Reg. 24,303 \(May 6, 2021\)](#).

⁵ *Coalition for Workforce Innovation v. Walsh*, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).

⁶ *Examining Biden’s War on Independent Contractors: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 118th Cong. (2023) (statement of Tammy McCutchen at 15).

⁷ *Id.*

⁸ *See* *Independent Contractor Status Under the FLSA*, 86 Fed. Reg. 1168 (Jan. 7, 2021).

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provide more information to workers and businesses about this complex issue.⁹ Following the federal district court’s ruling to reinstate the Trump rule, then-Committee on Education and Labor Ranking Member Virginia Foxx wrote to DOL requesting WHD immediately re-publish these opinion letters.¹⁰ Unsurprisingly, DOL declined.¹¹

While it is clear that the Biden administration does not agree with the Trump independent contractor rule, the administration can not ignore the law as written. DOL’s alleged abuse of discretion and arbitrary enforcement of the independent contractor rule raises troubling questions about your leadership.

In order to assist the Committee in its review of this matter, please provide responses to the following questions and provide documents responsive to the following requests by no later than May 18, 2023:

1. All documents and materials demonstrating that WHD updated its field manual to ensure personnel are conducting enforcement in accordance with the January 2021 final independent contractor rule;
2. All documents and materials used to educate personnel to ensure they are conducting enforcement in accordance with the January 2021 final independent contractor rule;
3. A list of all education sessions held since March 8, 2021, that included instruction on how to conduct enforcement in accordance with the January 2021 final independent contractor rule—including the date, names of the instructors, and number of personnel who received instruction;
4. A list of all independent contractor investigations conducted since March 8, 2021—including, for each, a notation of those investigations that concluded workers were correctly classified as independent contractors; and
5. DOL’s justification for prominently posting “Fact Sheet 13: Employment Relationships Under the [FLSA]”¹²—which includes a six-part test that is not current law—on WHD’s website rather than exclusively highlighting the FLSA worker classification test, as articulated in the January 2021 final independent contractor rule that is still in effect.

The Committee has jurisdiction over DOL’s enforcement of the FLSA and “shall review and study on a continuing basis laws, programs, and government activities” as set forth in House

⁹ DOL, WHD, Opinion Letter Search, FLSA2021-8 & FLSA2021-9, <https://www.dol.gov/agencies/whd/opinion-letters/search>.

¹⁰ Letter from Rep. Virginia Foxx to Martin J. Walsh, Sec’y of Lab. (Apr. 12, 2022), https://edworkforce.house.gov/uploadedfiles/04.12.22_-_letter_to_walsh.pdf.

¹¹ Letter from Jessica Looman, Acting Dir., WHD, to Rep. Virginia Foxx (May 20, 2022) (on file with the Committee).

¹² DOL, WHD, FACT SHEET 13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (revised Mar. 2022), <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>.

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Rule X. This request and any documents created as a result of this request will be deemed congressional documents and considered property of the Committee on Education and the Workforce. An attachment to this letter provides additional information about responding to the Committee's request.

Thank you for your prompt attention to this matter.

Sincerely,

Handwritten signature of Virginia Foxx in blue ink.

Virginia Foxx
Chairwoman

Handwritten signature of Kevin Kiley in blue ink.

Kevin Kiley
Chairman
Subcommittee on Workforce Protections

Enclosure

Responding to Committee Document Requests

1. The agency's response to questions and request(s) should be answered or provided in a separate document and not included inside a narrative response.
2. In complying with this request, you should produce all responsive documents that are in your agency's possession, custody, or control, whether held by you or other past or present employees of the executive branch, or a representative acting on your behalf. Your response should also produce documents that you have a legal right to obtain, that the agency has a right to copy or to which you have access, or that you have placed in the temporary possession, custody, or control of any third party.
3. Records, documents, data or information that have been requested and/or are related to underlying requests should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee on Education and the Workforce (the "Committee").
4. If any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
5. The Committee's preference is to receive documents in electronic form (i.e., email, CD, memory stick, or thumb drive) in lieu of paper productions. To the extent responses are provided in paper form, any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to a request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued.
6. Regardless of format, documents produced pursuant to this request should be produced in the order in which they appear in your files and should not be rearranged. Indicate the office or division and person from whose files each document was produced.
7. Regardless of format, documents produced to the Committee should include an index describing the contents of the production and a total page count for the entire production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box, or folder should contain an index describing its contents. Documents produced in electronic format should also be identified and indexed electronically.
8. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.

(c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

9. All documents shall be Bates-stamped sequentially and produced sequentially.
10. When you produce documents, you should individually identify the paragraph, question number or request number in the Committee's request to which the documents respond.
11. It shall not be a basis for refusal to produce documents that any other person or entity—either inside or outside of the executive branch—also possesses non-identical or identical copies of the same documents.
12. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), the agency's staff should consult with the Committee staff to determine the appropriate format in which to produce the information.
13. If compliance with any request cannot be made in full, compliance shall be made to the extent possible and shall include a written explanation of why full compliance is not possible.
14. If the agency does not expect to produce all documents responsive to a request by the date requested, the agency's staff shall consult with the Committee as soon as it is known the agency cannot meet the deadline, but no later than 24 hours before the due date to explain:
 - (a) what will be provided by the due date;
 - (b) why the agency believes certain materials cannot be produced by the due date; and
 - (c) the agency's proposed timeline for providing any omitted information.
15. If any document responsive to this request was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this request, you should:
 - (a) identify the document, including its date, author, subject, and recipients;
 - (b) explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party;
 - (c) state how the document was disposed of;
 - (d) identify the name, current address, and telephone number of the person who currently has possession, custody or control over the document;
 - (e) state the date of disposition; and

- (f) identify the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.
16. If any document responsive to this request cannot be located, identify the document and describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.
17. In the event that a document or portion of a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document or redaction:
- (a) Bates number(s);
 - (b) the privilege asserted and the grounds therefor;
 - (c) the type of document;
 - (d) the general subject matter;
 - (e) any other description necessary to identify the document;
 - (f) the date, author, and addressee; and
 - (g) the relationship of the author and addressee to each other.

If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced.

18. Any objections or claims of privilege are waived if you fail to provide an explanation of why full compliance is not possible and a log identifying with specificity the ground(s) for withholding each withheld document prior to the request compliance date.
19. In complying with the request, be apprised that (unless otherwise determined by the Committee) the Committee does not recognize: any purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative-process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.
20. Any assertion by a request recipient of any such non-constitutional legal bases for withholding documents or other materials, for refusing to answer any deposition question, or for refusing to provide hearing testimony, shall be of no legal force and effect and shall not provide a justification for such withholding or refusal, unless and only to the extent that the Committee (or the chair of the Committee, if authorized) has consented to recognize the assertion as valid.

21. If a date or other descriptive detail set forth in this request referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or other agency employees, or is otherwise apparent from the context of the request, you should produce all documents that would be responsive as if the date or other descriptive detail were correct.
22. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 20, 2021 to the present.
23. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery. Such submission shall include an explanation as to why the information was not produced originally.
24. If physical documents are to be delivered, two sets of documents should be delivered, one set to the Majority Staff in Room 2176 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building during Committee office hours (9am-5pm, unless other arrangements are made) and signed by members of the respective staffs upon delivery.
25. Upon completion of the document production, the agency's written response should include a written certification, signed by the Secretary or his or her designee, stating that:
 - (a) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and
 - (b) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or

representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term “documents in your possession, custody or control” means documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and/or documents that have been placed in the possession, custody, or control of any third party.
3. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
4. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
5. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
6. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
7. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflect s, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
8. The term “agency” means any department, independent establishment, or corporation of the federal government. For the purposes of responding to oversight requests, the Committee expects information to be provided from all sub-agencies of an agency and not just the information that is immediately available to the addressee or the addressee’s immediate sub-agency.
9. The term “privilege” includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any statute, rule, or regulation.

10. The term “employee” means agent, borrowed employee, casual employee, consultant, de facto employee, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, contract employee, contractor, or any other type of service provider.
11. The term “Administration” means and refers to any department, agency, division, office, subdivision, entity, official, administrator, employee, attorney, agent, advisor, consultant, staff, or any other person acting on behalf or under the control or direction of the Executive Branch.
12. “You” or “your” means and refers to you as a natural person and the United States and any of its agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, contractors, or any other persons acting on your behalf or under your control or direction; and includes any other person(s) defined in the document request letter.